No. 79-1640

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In The

# Supreme Court of the United States

October Term, 1980

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

*Appellants,*

*vs.*

BOROUGH OF MOUNT EPHRAIM,

*Appellee.*

*On Appeal from the Supreme Court of New Jersey*

## BRIEF FOR APPELLANTS

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PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

## QUESTIONS PRESENTED

1. May a municipality, in the exercise of its zoning power, proscribe all forms of live entertainment within its boundaries without violation of the appellants' federal constitutional guarantees of freedom of speech and expression and due process?

2. The appellants maintain a form of amusement device consisting of a booth in which a brief film is exhibited upon the insertion of a coin by a patron. The device is acknowledged by the appellee to be a use permitted by its zoning ordinances. Those same ordinances have been interpreted to proscribe a second amusement device also consisting of a booth, also coin-activated, but which permits the patron to view a live dancer performing beyond a glass panel instead of a film.

Are not those zoning ordinances, as interpreted and applied, transgressive of the appellants' federal constitutional guarantees of due process and equal protection in that those ordinances proscribe the second amusement device despite the absence of any factors which differentiate it, for the purposes of zoning, from the first amusement device?

## TABLE OF CONTENTS

*Page*

Questions Presented ..... i

Table of Contents ..... ii

Table of Citations ..... iii

Opinions Below ..... 1

Jurisdiction ..... 2

Ordinances and Constitutional Provisions Involved ..... 2

Statement of the Case ..... 4

A. Statement of the Facts ..... 4

B. Procedural History ..... 5

Summary of Argument ..... 7

Argument:

I. The Zoning Ordinances of the Borough of Mount Ephraim as interpreted and applied to the appellants impermissibly burden and suppress the appellants' First Amendment freedoms. ..... 9

A. Introduction: The Conflict Between the Zoning Power and Fundamental Rights. ..... 9

B. The Threshold Question: Has a Fundamental Right Been Abridged by the Borough's Zoning Ordinances? ..... 15

*Contents*

*Page*

C. The Borough's Ordinances Fail to Meet the *O'Brien* Test. ..... 18

D. The Borough's Ordinances Constitute an Impermissible Prior Restraint. ..... 23

E. The Borough's Ordinances are a Subterfuge for the Suppression of Protected Expression. .... 29

II. The Zoning Ordinances of the Borough of Mount Ephraim as interpreted and applied to the appellants are invalid as offensive to the appellants' federal constitutional guarantees of due process and equal protection in that they have been arbitrarily applied.. 30

Conclusion ..... 32

## TABLE OF CITATIONS

**Cases Cited:**

Adderly v. Florida, 385 U.S. 39 (1966) ..... 24

Agins v. City of Tiburon, ____ U.S. ____, 100 S. Ct. 2138 (1980) ..... 13

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1962) .....15, 24

Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) ..... 22

Berman v. Parker, 348 U.S. 26 (1954) ..... 9

*Contents*

*Page*

Blount v. Rizzi, 400 U.S. 410 (1971) .....28, 29

Brown v. Glines, 444 U.S. 348, 100 S. Ct. 609 (1980) .....15, 24

California v. LaRue, 409 U.S. 109 (1972) ..... 16, 18, 19, 21

Cameron v. Johnson, 390 U.S. 611 (1968) ..... 24

Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1978) .....15, 28

Cohen v. California, 403 U.S. 15 (1971) .....17, 20

Consol. Edison Co. v. Public Service Com'n., ____ U.S. ____, 100 S. Ct. 2326 (1980) ..... 14

County Bd. of Arlington Cty., Va. v. Richards, 434 U.S. 5 (1977) ..... 13

Cox v. Louisiana, 379 U.S. 536 (1965) ..... 24

Cox v. New Hampshire, 312 U.S. 569 (1941) ..... 24

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ..... 18

Dunn v. Blumenstein, 405 U.S. 330 (1972) ..... 10

E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Texas 1977) ..... 30

Eisenstadt v. Baird, 405 U.S. 438 (1972) ..... 10

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ..... 23

*Contents*

*Page*

Euclid v. Amber Realty Co., 272 U.S. 365 ..... 9, 18, 29, 31

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) . 11

Freedman v. Maryland, 380 U.S. 51 (1965) .....28, 29

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) . 10

Herndon v. Lowry, 301 U.S. 242 (1937) ..... 11

Home Builders Ass'n v. Borough of Paramus, 7 N.J. 335 (1951) .....25, 26

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ..... 16

Keyishian v. Board of Regents of U. of St. of N.Y., 385 U.S. 589 (1967) ..... 10

Kois v. Wisconsin, 408 U.S. 229 (1972) ..... 17

Kovacs v. Cooper, 336 U.S. 77 (1949) .....20, 24

Lehman v. Shaker Heights, 418 U.S. 298 (1974) ..... 24

Linmark Association Inc. v. Township of Willingboro, 431 U.S. 85 (1977) ..... 20

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) ..... 13, 23, 29, 31

Murdock v. Pennsylvania, 319 U.S. 105 (1943) ..... 15

NAACP v. Button, 371 U.S. 415 .....11, 19

*Contents*

*Page*

Near v. Minnesota, 283 U.S. 697 (1931) .....15, 24

Nectow v. Cambridge, 277 U.S. 183 (1928) .....9, 31

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..... 11

NLRB v. Fruitpackers Local 760, 377 U.S. 80 (1964) ..... 20

Nortown Theatre Incorporated v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974) ..... 22

Papish v. Board of Curators, 410 U.S. 667 (1963) ..... 17

Poulos v. New Hampshire, 345 U.S. 395 (1953) ..... 24

Rogoff v. Tufariello, 106 N.J. Super. 303 (App. Div. 1969) . 27

Roth v. United States, 354 U.S. 476 (1957) ..... 17

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) ..... 14

Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405 (1952) ..... 18

Schneider v. Town of Irvington, New Jersey, 308 U.S. 147 (1939) .....11, 21

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) ..... 15, 16, 21, 28

Spence v. Washington, 418 U.S. 405 (1974) ..... 21

*Contents*

*Page*

Thomas v. Collins, 323 U.S. 516 (1945), reh. denied, 323 U.S. 819 (1945) ..... 11

Times Film Corp. v. Chicago, 365 U.S. 43 (1961) ..... 24

United States v. O'Brien, 391 U.S. 367 (1968) ..... 11, 14, 18, 29

United States v. Carolene Products Co., 304 U.S. 144 (1938) . 10

Vance v. Universal Amusement Co., 445 U.S. 308 (1980) ... 15

Verona Inc. v. Mayor and Council of West Caldwell, 49 N.J. 274 (1967) ..... 25

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) .....12, 13

Village of Schaumburg v. Citizens, Etc., ____ U.S. ____, 100 S. Ct. 826 (1980) ..... 19

Winters v. New York, 333 U.S. 507 (1948) ..... 16

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) ..... 13, 14, 17, 18, 19, 21, 22, 30

**Statutes Cited:**

28 U.S.C. §1257(2) ..... 2

N.J.S. 40:55-30, et seq. ..... 18

N.J.S. 40:55-39 ..... 25, 26, 27

N.J.S. 40:55-39d ..... 28

*Contents*

*Page*

N.J.S. 40:55D-70 ..... 26

**United States Constitution Cited:**

First Amendment ..... 2, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, 20, 21

Fourteenth Amendment ..... 2, 4, 5, 6, 15

**Rules Cited:**

Rule 2:12-9 ..... 2

Rule 4:69-1 ..... 26, 27

Rule 4:69-6(b) ..... 26, 27

**Other Authorities Cited:**

Mount Ephraim Zoning Ordinance:

§99-15B ..... 2, 5

§99-4 ..... 3

E. Frankfort, Vaginal Politics (1974) ..... 17

Goldman, A Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc., 21 St. Louis Univ. Law J. 281 (1977) ..... 22

I. Bengis, Combat in the Erogenous Zone (1972) ..... 17

Miller, Obscenity and the Law of Reflection, 51 Ky. L.J. 577 (1963) ..... 17

*Contents*

*Page*

K. Millett, The Prostitution Papers: A Quartet for Female Voice (1971) ..... 17

Playboy Interview: Jimmy Carter, 23 Playboy, Nov. 1976 at 63 ..... 17

Douglas, The Attack on the Right to Privacy, 14 Playboy, Dec. 1967 at 189 ..... 17

The Supreme Court, 1975 Term, Harv. L. Rev. 196 (Nov. 1976) ..... 17

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BOROUGH OF MOUNT EPHRAIM,

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*On Appeal from the Supreme Court of New Jersey*

## BRIEF FOR APPELLANTS

## OPINIONS BELOW

Neither the opinion of the Camden County Court nor the opinion of the Superior Court of New Jersey, Appellate Division affirming the judgment of the lower court were reported. Those opinions, as well as the judgment of the Camden County Court are reprinted in the Appendix to the Jurisdictional Statement and appear at pages 1a, 14a and 15a respectively. The order of

the New Jersey Supreme Court denying the appellants' petition for certification appears at 82 N.J. 287 (1980). (According to the Rules Governing the Courts of the State of New Jersey, where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, the denial of certification constitutes a summary dismissal of the appeal. Rule 2:12-9.)

## JURISDICTION

In this matter, the appellants have been made to suffer criminal penalties for their purported violation of the appellee's zoning ordinances — ordinances which they contend are transgressive of their federal constitutional guarantees of freedom of speech and expression, due process and equal protection embodied in the First and Fourteenth Amendments.

On January 18, 1980, the Supreme Court of New Jersey entered separate orders dismissing the appellants' appeal from and denying their petition for certification to the Superior Court of New Jersey, Appellate Division. The appellants filed their notice of appeal on April 14, 1980 and their appeal was docketed by the Clerk of the United States Supreme Court on April 16, 1980. Accordingly, the Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

## ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Borough of Mount Ephraim Zoning Ordinance 99-15B provides:

> "B. Principal permitted uses on the land and in buildings.

(1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries, pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

(2) Motels."

Borough of Mount Ephraim Zoning Ordinance 99-4 provides:

"§99-4. Prohibited uses.

All uses not expressly permitted in this chapter are prohibited."

First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress or grievances."

Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### A. Statement of the Facts

The essential facts are simply stated. In June of 1973, the appellants opened for business in a commercial zone in the Borough of Mount Ephraim, offering for sale, at retail, various books, magazines and films. Shortly after its commencement of business, 613 Corporation obtained amusement licenses for the operation of a number of coin-operated devices. Each of the devices consisted of a booth in which a film is shown upon the patron's insertion of a coin. In July of 1976, the appellants commenced to offer an additional form of amusement. That second form of amusement consisted of a booth with an opaque glass panel. Upon the patron's insertion of a coin, the panel became clear which enabled the patron to view a dancer — usually nude — performing beyond the glass. It is the Borough's contention that the appellants' conduct, in offering that second form of amusement, violated its zoning laws and made them subject to criminal penalties.

**B. Procedural History**

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann DiLuciano with the use of the premises of 613 Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance 99-15B. In that proceeding, the appellants filed a brief in support of their motion to dismiss the complaints. In their brief, the appellants argued that the Borough's interpretation of its ordinance and the application of the ordinance to them violated the appellants' rights secured by the First and Fourteenth Amendments to the United States Constitution. Specifically, the appellants contended that the activity to which the Borough objected — live nude dancing — was expression presumptively protected by the First Amendment. Further, the appellants contended that the Borough's ordinance (which the Borough interpreted to proscribe live entertainment throughout its boundaries) attempted to suppress rather than regulate presumptively protected expression and that the ordinance was unduly vague and overly broad. The brief further contended that the ordinance offended the requirements of due process and equal protection in that, in its application to the appellants, it was unreasonable and arbitrary. The municipal court specifically determined that the appellants' activity was not protected by the First Amendment and impliedly determined the balance of the issues raised by the appellants against them in its decision on June 2, 1978. Each of the appellants were found guilty and sentenced to pay a fine of $300 (JS2a).

The appellants filed a timely notice of appeal with the Camden County Court on June 13, 1978. A trial *de novo* was had on the record made in the municipal court to include the briefs filed with that court (JS1a). The Camden County Court determined that, although live nude dancing is protected by the First Amendment ". . . First Amendment guarantees are not

involved in this matter." (JS8a). It further determined that ". . . there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights." (JS12a). Impliedly rejecting the balance of the appellants' contentions, the Camden County Court found each of them guilty as charged and sentenced each of them to pay a fine together with costs (JS13a). An order to that effect was entered on November 3, 1978 (JS15a).

On November 24, 1978, the appellants filed their notice of appeal from their conviction in the Camden County Court with the Superior Court of New Jersey, Appellate Division. On appeal, the appellants contended that their convictions were violative of their First and Fourteenth Amendment guarantees. The Appellate Division affirmed the appellants' convictions on October 17, 1979 for the reasons expressed by the Camden County Court (JS14a).

On November 5, 1979, the appellants filed both a notice of petition for certification and a notice of appeal to the Supreme Court of New Jersey. The appellants sought review on grounds which included their contention that their convictions were violative of the First and Fourteenth Amendment guarantees. On January 18, 1980, the New Jersey Supreme Court entered an order denying the appellants' petition for certification and dismissing their appeal (JS17a, 18a).

The appellants filed their notice of appeal to the Supreme Court of the United States on April 14, 1980 (JS19a). Their appeal was docketed on April 16, 1980 and probable jurisdiction was noted on October 14, 1980.

## SUMMARY OF ARGUMENT

The appellants will readily concede that the appellee has the power to enact zoning ordinances and that those ordinances are, generally, to be afforded a presumption of validity when attacked. However, when the exercise of the municipality's authority conflicts with such "preferred freedoms" as First Amendment values, the usual presumption of validity is heavily outweighed by other considerations. Specifically, where governmental regulation incidentally impinges upon freedom of speech and expression, the court requires the regulation to be found necessary to further an important or substantial governmental interest unrelated to the suppression of free expression and requires the regulation to be such that the incidental restriction on First Amendment freedoms be no greater than is essential to the furtherance of that governmental interest. The court further must subject the regulation to particularly careful scrutiny.

The appellee's zoning ordinance has been contended by it and has been found by the Camden County Court to proscribe live entertainment — presumably in all of its forms — throughout the Borough. More particularly, the appellee's zoning ordinances have been found to proscribe the live nude dancing entertainment offered by the appellants. That live entertainment in general and live nude dancing in particular clearly are covered by the First Amendment's protective cloak. However, no interest whatsoever has been advanced by the appellee as justification for its total ban on live entertainment except perhaps, implicitly, the advancement of the public welfare through zoning. The appellee's interest, whatever it may be, has not been shown to be substantial in the pertinent sense, nor is the appellee's zoning regulation purportedly furthering that interest in any way "tailored" so as to restrict, as little as

possible, First Amendment freedoms. The ordinance therefore, fails to meet the test for regulations which incidentally burden freedom of speech and expression.

Irrespective of any other defects in the Borough's zoning ordinances, they constitute a prior restraint on protected expression in that they require any use of premises located in the Borough for live entertainment to be preceded by the grant by the Borough of a variance. The system of prior restraints imposed by the Borough is unable to overcome the heavy presumption against its invalidity, fits into none of the limited exceptions where the prior restraints are allowed and, further, is procedurally deficient.

Finally, appellee's sincerity in any assertion that that interest is unrelated to the suppression of free expression is subject to question. For the application of the appellee's zoning ordinances to the appellants' conduct has the very strong appearance of being a mask for the harassment of the appellants. Accordingly, the ordinance, as interpreted and applied, is invalid as an unconstitutional suppression of free expression.

Due process and equal protection concepts require that classifications made by a regulating body will not be unreasonable, arbitrary or capricious. The appellee's zoning ordinance, as interpreted and applied, permits the appellants to maintain coin-operated amusement booths in which patrons may individually view films. It prohibits, however, coin-operated amusement booths in which patrons may individually view a live nude dancer. There being nothing about the second form of amusement which is, in any way, any more inimical to the purposes of the Borough's zoning ordinance than the first, the ordinance, as interpreted and applied, is arbitrary, unreasonable and therefore, invalid. This is expecially so as the appellee has advanced not even a single reason for the distinction that it has made.

## ARGUMENT

### I.

### THE ZONING ORDINANCES OF THE BOROUGH OF MOUNT EPHRAIM AS INTERPRETED AND APPLIED TO THE APPELLANTS IMPERMISSIBLY BURDEN AND SUPPRESS THE APPELLANTS' FIRST AMENDMENT FREEDOMS.

#### A. Introduction: The Conflict Between the Zoning Power and Fundamental Rights.

At the outset, the appellants readily acknowledge that municipalities have long been empowered to promulgate land use regulations to promote the public health, safety, morals or general welfare and that those regulations may embrace a broad range of governmental purposes.[1] Further, deference should be given to governmental judgments concerning proper land-use allocation and no interference with land-use regulations should be brooked unless those regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Euclid v. Amber Realty Co.*, 272 U.S. at 395.

A concept coordinate with the preference usually accorded to land-use regulation is the pre-eminence of certain "preferred freedoms".

> "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of that Constitution, such as

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1. *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Berman v. Parker*, 348 U.S. 26 (1954).

> those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

*United States v. Carolene Products Co.*, 304 U.S. 144 at 152 n. 4 (1938). Where regulation affects "preferred" or "fundamental" freedoms, the regulation must be essential to serve "compelling State interests" and cannot be supported if merely "rationally related" to a valid public purpose. *Dunn v. Blumenstein*, 405 U.S. 330 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Where, then, "fundamental" freedoms are involved, classifications which might invade or restrict them must be closely scrutinized and carefully confined. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Even though the governmental purpose is shown to be appropriately legitimate and substantial, a regulation seeking to achieve that purpose cannot be sustained on attack if that regulation employs means that ". . . broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589 at 602 (1967).

The freedoms guaranteed by the First Amendment appear to enjoy a special preference.

> "[T]he usual presumptions supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedom secured by the First Amendment. (Cit.Om.) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusion and it is the character of the right, not of the limitation, which determines what standard governs the choice. (Cit.Om.)

> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts, might support legislation against attack on due process grounds or not suffice. These rights rest on firmer foundation."

*Thomas v. Collins,* 323 U.S. 516 at 530 (1945), *reh. denied,* 323 U.S. 819 (1945).[2]

It has been emphasized that "[t]he power of a state to abridge freedom of speech is the exception rather than the rule . . ." *Herndon v. Lowry,* 301 U.S. 242 at 258 (1937) and ". . . only a compelling state interest . . . can justify limiting First Amendment freedoms." *NAACP v. Button,* 371 U.S. 415 at 438 (1963).

On occasion, the Court may find the preference usually accorded to land-use regulation in conflict with the pre-eminence of "preferred freedoms". On those, perhaps, rare occasions

> ". . . it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement [appropriate] purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when

2. *See generally, First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *United States v. O'Brien,* 391 U.S. 367 (1968); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *NAACP v. Button,* 371 U.S. 415 (1963); *Schneider v. New Jersey,* 308 U.S. 147 (1939).

> adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights."

*Village of Belle Terre v. Boraas,* 416 U.S. 1 at 14 (1974), dissenting opinion of Marshall, J. Where a

> ". . . zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest (cit.om.). And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. (Cit.Om.)"

*Id.,* 416 U.S. 1 at 18, dissenting opinion of Marshall, J.[3]

Subsequent to its decision in *Village of Belle Terre v. Boraas,*[4] the Court has had occasion to consider whether a land-use regulation impermissibly infringed upon a "fundamental"

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3. It would not appear that the majority of the Court would disagree with the comments of Justice Marshall quoted above. Rather, the majority specifically found, contrary to the view of Justice Marshall, that the ordinance under scrutiny operated to deprive no "fundamental" right guaranteed by the Constitution such as the right of association or any rights of privacy, *Id.,* 416 U.S. at 7, 13. Accordingly, the majority required only that the ordinance be "reasonable, not arbitrary" and that the ordinance bear "a rational relationship to a [permissible] state objective." *Id.,* 416 U.S. at 8.

4. 416 U.S. 1 (1974).

liberty.[5] Only on one of those occasions did the Court answer in the affirmative the threshold question as to whether a "fundamental" right was involved. In *Moore v. City of East Cleveland, Ohio,*[6] the Court found a constitutional right of familial association in privacy rooted in substantive due process.[7] Recognizing that the ordinance in question abridged a fundamental right, the Court then proceeded to apply the analytical standard, at least in spirit, suggested as appropriate by Justice Marshall in *Village of Belle Terre v. Boraas.*[8] East Cleveland's ordinance was shorn of "the usual judicial deference to the legislature" and its asserted governmental interests and the extent to which they were served by the challenged regulation were subjected to careful examination and scrutiny to determine whether the city's needs justified the abridgement of a fundamental right.[9] Despite the city having advanced goals which the Court acknowledged to be legitimate, the ordinance was found lacking.[10] It seems clear, then, that any land-use

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5. *Agins v. City of Tiburon,* ___ U.S. ___, 100 S. Ct. 2138 (1980) (taking of property without just compensation contrary to Fifth Amendment contended); *County Bd. of Arlington Cty., Va. v. Richards,* 434 U.S. 5 (1977) (distinction between residents and non-residents drawn denying Fourteenth Amendment equal protection contended); *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 (1977) (denial of Fourteenth Amendment due process right protecting family contended); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976) (denial of First Amendment freedom of expression and Fourteenth Amendment equal protection contended).

6. 431 U.S. 494 (1977).

7. *Id.,* 431 U.S. 499, 502, 504, 507.

8. 416 U.S. 1 (1974).

9. *Moore v. City of East Cleveland,* 431 U.S. at 499, 502.

10. *Id.,* 431 U.S. at 500.

regulation which burdens a "fundamental" right must withstand particularly careful scrutiny to be found valid.[11]

Where the "fundamental" right intruded upon by a land-use regulation is one guaranteed by the First Amendment, the Court's analytical problem has a further dimension — particularly where that right is the guarantee of freedom of speech and expression. Generally, governmental regulation which incidentally burdens First Amendment freedoms can only be sustained

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest."

*United States v. O'Brien*, 391 U.S. 367 at 377.[12] A further reason

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11. "[S]trict scrutiny means that the [classification scheme] is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its [classification] system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objective. . . ."

*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, at 16-17 (1973) (Footnote Omitted).

12. *See also, Young v. American Mini Theatres, Inc.*, 427 U.S. 50, at 79-80 concurring opinion of Powell, J. *Compare Consol. Edison Co. v. Public Service Com'n.*, ____ U.S. ____, 100 S. Ct. 2326, at 2335 n. 9 (1980).

for analytical differentiation arises when the land-use regulation in question constitutes a "prior restraint". For any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity and in order for it to be held lawful, it must fall within one of the narrowly defined exceptions to the prohibition against prior restraints and must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 at 558-559 (1975).[13]

**B. The Threshold Question: Has a Fundamental Right Been Abridged by the Borough's Zoning Ordinances?**

Before reaching the analytical problem, however, the threshold question of whether a fundamental right is involved must be addressed. The right asserted to have been abridged by the Borough's zoning ordinances is, of course, that of freedom of speech and expression guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment to the Federal Constitution.[14] The particular activity engaged in and sought to be engaged in by the appellants which they claim is protected by the First Amendment is their offering to the public live entertainment generally and, in particular, live nude dancing.

> "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problem. (Cit.Om.) By its nature, theater usually is the acting out — or singing out — of

13. *See also, Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980); *Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 609 (1980); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1978); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1962); *Near v. Minnesota,* 283 U.S. 697 (1931).

14. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).

the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. For, as was said in *Burstyn* (Cit.Om.), when the court was faced with a question of what First Amendment standard applies to films,

> '[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court make freedom of expression the rule. There is no justification in this case for making an exception to that rule.'"

*Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 at 557-558. The fact that a mode of expression is designed for entertainment purposes does not lessen the importance of that mode as an organ or forum for public opinion. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 at 501 (1952). In fact, where a mode of expression has value as entertainment, its importance as a medium for communication is heightened. Accordingly, it should be protected all the more rigorously for "[w]hat is one man's amusement, teaches another's doctrines." *Winters v. New York,* 333 U.S. 507 at 510 (1948).[15]

Expression in general and live entertainment in particular should be entitled to no less rigorous protection because it is sexually explicit, for

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of

15. Live performances and dance are regularly afforded broad prima facie First Amendment protection. *See California v. LaRue,* 409 U.S. 109, at 130 (1972), dissenting opinion of Marshall, J. and cases cited therein.

> absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

*Roth v. United States,* 354 U.S. 476 at 487 (1957). *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 87, dissenting opinion of Stewart, J. Further,

> ". . . much linguistic expression serves a dual communicative function; it conveys not only ideas capable of relatively precise, detached explication but otherwise inexpressible emotion as well. . . . We cannot sanction the view that the constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking, may be the more important element of the overall message sought to be communicated."

*Cohen v. California,* 403 U.S. 15 at 26 (1971). Sexually explicit communication, then, may and often does convey an aesthetic message or emotional message quite apart from a message in the form of an idea.[16] Perhaps subsumed by these considerations,

16. Sexually explicit speech serves as a means of conveying ideas including ideas with political significance where sex, itself, may be part of the message. I. Bengis, *Combat in the Erogenous Zone* (1972); E. Frankfort, *Vaginal Politics* (1974); K. Millett, *The Prostitution Papers: A Quartet for Female Voice* (1971). Sexually explicit speech may be invaluable "as a technical device . . . to awaken, to usher in a sense of reality." Miller, *Obscenity and the Law of Reflection,* 51 Ky. L.J. 577, 587 (1963). *See, e.g., Papish v. Board of Curators,* 410 U.S. 667 (1963); *Kois v. Wisconsin,* 408 U.S. 229 (1972). Even national figures exploit sexually oriented media to increase their audience. *See, e.g.,* Playboy Interview: Jimmy Carter, 23 *Playboy,* November 1976 at 63; Douglas, The Attack on the Right to Privacy, 14 *Playboy,* December 1967 at 189. *See generally,* The Supreme Court, 1975 Term, Harv. L. Rev. 196 (Nov. 1976).

nude dancing has repeatedly been acknowledged to be entitled to First Amendment protection. *Young v. American Mini Theatres, Inc., supra; Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue, supra.* Accordingly, live entertainment generally and live nude dancing in particular are protected by the First Amendment.

**C. The Borough's Ordinances Fail to Meet the *O'Brien* Test.**

We turn now to the application of the *O'Brien* standard to the Borough's zoning ordinances. At the outset, the Borough is unquestionably empowered to enact land-use regulations. *Euclid v. Amber Realty Co., supra; Schmidt v. Board of Adjustment of City of Newark*, 9 N.J. 405 (1952); N.J.S. 40:55-30, *et seq.* Throughout this litigation, the Borough has repeatedly maintained, both impliedly and expressly, that its land-use ordinances were originally enacted and subsequently applied to the appellants' conduct to further the beneficent purposes of zoning and for no other purpose.[17] The governmental interests served by land-use regulations are clearly unrelated to the suppression of free expression. Here ends, however, the ability of the Borough's zoning ordinances to meet the *O'Brien* test. Never in this litigation has the Borough identified the specific "important or substantial governmental interest" that is furthered by the total proscription of all forms of live entertainment throughout the length and breadth of the Borough. Apart from its failure to identify the specific interest, the record is totally devoid of support for any contention by the Borough that that interest is "substantial" and is further devoid

17. *See, e.g.*, Respondent's Motion to Dismiss at 7 where the Borough maintains ". . . the ordinance is not aimed at suppressing speech, but is designed to regulate land use within the Borough's boundaries."

of any indication how that obscure interest is served by a ban on all forms of live entertainment.[18]

Even if the Borough were to advance a legitimate and substantial interest which is, in some way, served by its blanket exclusion of live entertainment, the reach of that exclusion must surely render the ordinances invalid for "the incidental restriction on . . . First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[19] The Court has repeatedly emphasized

> "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchdown. . . ."

*NAACP v. Button,* 371 U.S. 415 at 438; *Village of Schaumburg v. Citizens, Etc.,* ____ U.S. ____, 100 S. Ct. 826 at 836 (1980). Should live entertainment in general and live nude dancing in the appellants' adult book store in particular have been established as having an adverse effect on the public health, safety, welfare and morals, surely the Borough is capable of drafting regulations which mitigate acceptably those effects and which do not, at the same time, prohibit operas, dramatic and comedic theatre presentations, musical plays, concerts, chamber music recitals, magic shows, puppet shows, melodramas, vaudeville presentations, ballets, presentations of classical and modern interpretive dance, comedy monologues, circuses, talent and variety shows, and the like.

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18. *Compare, California v. LaRue, supra,* where the promulgation of regulations by the California Department of Alcoholic Beverage Control followed extensive hearings. And *compare, Young v. American Mini Theatres, Inc., supra,* where the record was replete with evidence that Detroit's zoning ordinances were necessary to prevent neighborhood decay and stem crime.

19. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 80.

The Borough suggests that, practically speaking, its complete proscription of a distinct medium of expression is a negligible burden, if any, on First Amendment freedoms. The Borough asserts

> "live entertainment is available throughout Camden County as is nude dancing in certain locations. Because the Borough of Mount Ephraim has elected not to allow live entertainment within its boundaries cannot give petitioners a boot strap argument that this violates its First Amendment rights."[20]

The Court, however, has acknowledged that means of expressing ideas are not interchangeable. Accordingly, it has guarded what the speaker has considered to be the most effective means for his communication.[21] The comments of Justice Black are particularly appropriate

> "This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city not violate First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more be validly taken away by degrees than by one fell swoop."

*NLRB v. Fruitpackers Local 760,* 377 U.S. 58 at 80 (1964) concurring opinion of Black, J. Clearly, one is ". . . not to have

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20. Respondent's Motion to Dismiss at 10.

21. *See, e.g., Cohen v. California,* 403 U.S. 15 at 26 (1971); *Kovacs v. Cooper,* 336 U.S. 77 at 87 (1949). *See also, Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) questioning whether a total prohibition of "for sale" and "sold" signs would leave open ample alternative channels for communications.

the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. Town of Irvington,* 308 U.S. 147 at 163 (1939).[22] In accord with these principles, the Court clearly telegraphed in both *LaRue* and *Young* that a regulation which constitutes a pervasive condemnation cannot be upheld. Justice Rehnquist writing for the majority in *LaRue* observed

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, a critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink."[23]

In *Young,* the Court considered the respondents' argument that Detroit's ordinances were invalid as prior restraints on free speech. Justice Stevens writing for the plurality wrote

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22. In *Schneider,* the Court invalidated an ordinance prohibiting the distribution of handbills to pedestrians on public streets despite the argument that the distributor could effectively exercise his First Amendment rights in some other form. *See also, Southeastern Promotions, Ltd. v. Conrad, supra,* where the Court determined that an exhibitor that wished to lease a theater belonging to the City for the purposes of exhibiting "Hair" could not be so precluded. The Court stated the fact that the exhibitor might have access to some other theater in the City was "of no consequence" even if that other facility would serve as well as the City auditorium. And further *see Spence v. Washington,* 418 U.S. 405 (1974) where the Court summarily rejected the argument of the Washington Supreme Court that the conviction of the appellant for improperly using an American flag by emblazoning a peace symbol across the front should stand because there were "thousands of other means available to [him] for the dissemination of his personal views" and the restriction of his freedom of expression "miniscule and trifling".

23. *California v. LaRue,* 409 U.S. 109 at 118.

> "The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."[24]

The *Young* Court found that what was ultimately at stake was nothing more than a limitation on the place where adult films might be exhibited in the City of Detroit. It cautioned, however

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[25]

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24. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 at 62.

25. *Id.* at 71 n. 35.

In point of fact, the district court which originally considered the Detroit ordinance found invalid a provision which prohibited the location of any regulated use within 500 feet of any dwelling or rooming unit. That court said "There are few, if any, locations other than industrial areas in the downtown commercial area of Detroit where there is not a single dwelling or living unit within 500 feet. Thus, the effect of the restriction is an almost total ban on uses conceded by the defendants to be lawful. While such an extreme effect might not render the restriction invalid under the equal protection clause if the City had demonstrated that its compelling interest was promoted thereby no such showing has here been made." *Nortown Theatre Incorporated v. Gribbs*, 373 F. Supp. 363 at 370 (E.D. Mich. 1974). For the same result in substantially identical circumstances, *see Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978). *Also see*, Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc.*, 21 St. Louis Univ. Law J. 281 at 294 n. 104 (1977).

Had the Borough's ordinances been drafted so as to proscribe only live nude dancing, it seems eminently unlikely that the ordinances could be sustained. The ordinances, of course, had been interpreted and applied by the Borough as disallowing all forms of live entertainment. Neither the Camden County Court, nor the Superior Court of New Jersey, Appellate Division were inclined to construe the Borough's ordinances more narrowly (JS7a, 14a). It cannot be seriously contended that ordinances which prescribe criminal penalties for any violation of their proscription of live entertainment do not constitute a real and substantial deterrent effect on legitimate expression. Their invalidity then is quite patent. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

**D. The Borough's Ordinances Constitute an Impermissible Prior Restraint.**

From the outset, the appellants have contended that the Borough's land-use regulations imposed a prior restraint on protected expression — for any use of their premises to offer live entertainment must be preceded by the grant by the Borough of a variance.[26]

> "Time and again, the Court has underscored the principle that restraints upon communication must be hedged about by procedures that

26. There would appear to be no necessity for the appellants to have first sought a variance before asserting their constitutional claims before this Court. The appellants' first notification of the unusual interpretation by the Borough of his zoning ordinances was their receipt of the criminal complaints which originated these proceedings. There is no New Jersey law which would require the appellants, in this context, to first seek a variance before presenting constitutional challenges to zoning ordinances in a criminal proceeding. Further, the courts below entertained and decided all of the appellants' constitutional arguments. Moreover, the inference is inescapable that, had the appellants sought a variance, the Borough would have denied their application. *See Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 at 497 n. 5.

> guarantee against infringement of protected expression and that eliminate the play of discretion that epitomizes arbitrary censorship. (citations omitted) . . . [S]pecific safeguards . . . are indispensable if a system of prior approval is to avoid First Amendment pitfalls. These include (1) the requirement that the burden of justifying censorship fall upon the censor (citations omitted), (2) the condition that the administrative suppression must be subject to speedy judicial review (citations omitted), and (3) the rule that those whose First Amendment interests are at stake be given a notice and an opportunity to be heard during suppression proceedings (citations omitted)."

*Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 594 at 612, dissenting opinion of Brennan, J. and cases cited therein. As noted *ante* any system of prior restraints comes to the Court bearing a heavy presumption against its validity. *See, e.g., Bantam Books, Inc. v. Sullivan, supra.* Further, a prior restraint, to be valid, must fit into one of a few limited exceptions. *Near v. Minnesota, supra.*[27] It is evident, even on cursory examination, that the Borough's zoning ordinances when read in conjunction with the applicable New Jersey statutes are unable to "avoid First Amendment pitfalls".

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27. *Near v. Minnesota, supra* (wartime secrets); *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961) (prior censorship of films); *Poulos v. New Hampshire,* 345 U.S. 395 (1953) and *Cox v. New Hampshire,* 312 U.S. 569 (1941) (reasonable time, place and manner restrictions); *Cameron v. Johnson,* 390 U.S. 611 (1968) and *Adderly v. Florida,* 385 U.S. 39 (1966) (use of a facility primarily serving a competing use); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (rights of individuals in surrounding areas); *Lehman v. Shaker Heights,* 418 U.S. 298 (1974) (captive audience); *Cox v. Louisiana,* 379 U.S. 536 (1965) (maintenance of social order).

Where a land owner in New Jersey wishes to put his property to a use that is legislatively prohibited he must obtain a variance. *Verona Inc. v. Mayor and Council of West Caldwell,* 49 N.J. 274 (1967). On an application for a variance, the applicant has the burden of proving that his situation is a particular case, there are special reasons compelling a determination in his favor and that the variance might be granted without substantial detriment to the public good and would not substantially impair the intent and the purpose of the zone plan or zoning ordinance. N.J.S. 40:55-39[28]; *Home Builders*

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28. The complete text of N.J.S. 40:55-39 reads as follows:

"The board of adjustment shall have the power to:

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning ordinance.

b. Hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass.

c. Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or by reason of exceptional topographic conditions, or by reason of other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under the act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to

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*Ass'n v. Borough of Paramus*, 7 N.J. 335 (1951). The refusal of the board of adjustment to recommend a variance may be challenged only by means of a suit in lieu of prerogative writ in the Superior Court of New Jersey. Rule 4:69-1; 4:69-6(b).[29] The

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(Cont'd)

> relieve such difficulties or hardship; provided, however, that no variance shall be granted under this paragraph to allow a structure or use in a district restricted against such structure or use.
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> d. Recommend in particular cases and for special reasons to the governing body of the municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use. Whereupon the governing body or board of public works may, by resolution, approve or disapprove such recommendation. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use.
>
> No relief may be granted or action taken under the terms of this section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

N.J.S. 40:55-39 was subsequently repealed by L. 1975, c. 291 §80, eff. Aug. 1, 1976 and replaced by N.J.S. 40:55D-70 which, for the purposes of this appeal, is substantially similar.

29. The complete text of Rule 4:69-1 reads as follows:

> "Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 shall be afforded by a civil action in the Law Division of the Superior Court. The complaint shall bear the designation 'In Lieu of Prerogative Writs'."

(Cont'd)

applicant may secure relief only by demonstrating that the board's action was arbitrary and capricious amounting to an abuse of its discretion. *Rogoff v. Tufariello,* 106 N.J. Super. 303 (App. Div. 1969). An affirmative recommendation by the board of adjustment is reviewed by the governing body of the municipality and it is the governing body that makes the ultimate determination on the issue of granting the requested variance. *Rogoff v. Tufariello, supra;* N.J.S. 40:55-39. The refusal of the governing body to grant the requested variance is reviewable by the Superior Court of New Jersey in an action in lieu of prerogative writ. Rule 4:69-1; 4:69-6(b).

It is quite obvious that New Jersey's use variance application procedures could never hope to satisfy the Court's strict requirements for a permissible system of prior restraints. It

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(Cont'd)

Rule 4:69-6(b), in pertinent part, reads as follows:

> "No action in lieu of prerogative writs shall be commenced . . . (3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality; provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution *(e.g.,* 'Variance-Store in residential zone denied'), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection. . . ."

Neither Rule has been amended.

is the applicant and not the Borough who bears the burden of proof. The applicant's burden is an especially heavy one in that he is required to demonstrate special reasons and to show affirmatively that the grant of the variance will neither do substantial detriment to the public good nor substantially impair the intent and purpose of the zone plan and zoning ordinance.[30] Although a prompt judicial determination is possible, it is extremely unlikely. There is no requirement that the board of adjustment hear a filed application within any particular period of time, nor is there any requirement that the board, once having heard the application, render its decision within any particular period of time. Likewise, there is no requirement that the governing body consider an affirmative recommendation by the board of adjustment within a particular time or, once having considered the recommendation, render its own resolution within a particular period of time. A determination by the Superior Court in the context of a suit in lieu of prerogative writ could be delayed interminably by administrative manipulation by the board and the governing body.[31] The Borough's system of prior restraints could hardly be more complete in its violation of the principles of *Freedman v. Maryland,* 380 U.S. 51 (1965) and *Blount v. Rizzi,* 400 U.S. 410 (1971). *See Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 594 at 612; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 at 559-560.

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30. N.J.S. 40:55-39d.

31. As a hypothetical example, an applicant might seek a variance to present a satirical debate between two bogus political candidates but in which real issues and the positions of actual political candidates are aired. The Borough might effectively suppress the live entertainment sought to be offered by simply administratively dragging its feet until election day has come and gone.

**E. The Borough's Ordinances are a Subterfuge for the Suppression of Protected Expression.**

Apart from the validity of the Borough's zoning ordinances, its sincerity in interpreting and applying those ordinances to the conduct of the appellants should be considered. In proceedings before, now, five separate judicial tribunals the Borough has never identified any distinct interest which is somehow served by a total prohibition on all live entertainment within its boundaries. At least so far as counsel for appellants have been able to discover, the Borough's absolute proscription is completely without precedent. Any claim by the Borough that the measure is somehow necessary (taking into consideration its severe impact on constitutionally protected expression) cannot be ingenuously accepted at face value. The Borough appears to be quite unconcerned about the long-standing, unamortized, non-conforming use of at least six other establishments for the purpose of live entertainment (JS4a-5a, 7a). Notwithstanding, however, the existence or non-existence of any legitimate governmental purpose served by the live entertainment ban, the Borough's ordinances are clearly invalid. They are unable to withstand *Moore's* careful examination and scrutiny, unable to pass the *O'Brien* test and violate virtually every principle of *Freedman* and *Blount*.[32] Considering the foregoing in context — that is, recalling that the appellants are the owners and operators of an adult book store — one would be hard-pressed not to recognize the earmarks, in the conduct of the Borough, of a somewhat transparent mask for the harassment of the appellants and the suppression of distasteful expression. As noted on the frontispiece *ante*, Justice Stevens has cautioned

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32. Should the Borough's governmental interest served by the exclusion of live entertainment be disclosed, it is doubtful that the ordinances could even pass the *Euclid* test. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 at 520, concurring opinion of Stevens, J.

> ". . . courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression. . . ."

*Young v. American Mini Theatres, Inc.*, 427 U.S. 50 at 84.[33] Where the power to zone is found to have been such a pretext, those zoning ordinances should be most forcefully struck down.

## II.

## THE ZONING ORDINANCES OF THE BOROUGH OF MOUNT EPHRAIM AS INTERPRETED AND APPLIED TO THE APPELLANTS ARE INVALID AS OFFENSIVE TO THE APPELLANTS' FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION IN THAT THEY HAVE BEEN ARBITRARILY APPLIED.

The Borough's zoning ordinances as interpreted and applied, permit the appellants to maintain coin-operated amusement booths in which patrons may individually view films. At the same time, however, those ordinances have been interpreted and applied to prohibit coin-operated amusement booths which patrons may individually view a live nude dancer.

Land-use regulations are required to be given deference by the Court on review and, before such a regulation can be declared unconstitutional it must be demonstrated that it is ". . . clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare." *Euclid v. Amber Realty Co.*, 272 U.S. 365 at 395. *Also*

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33. *See, e.g., E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Texas 1977).

*see, Moore v. City of East Cleveland, Ohio, supra; Nectow v. Cambridge, supra.* Stacking the Borough's ordinances, as interpreted and applied, against the *Euclid* test, it is apparent that they fall short of the mark. The two forms of amusement are so similar in their operation and character as to be for the purposes of zoning, indistinguishable. There is nothing about the second form of amusement, which is, in the least, any more inimical to the purposes of the Borough's zoning ordinances than the first. The Borough has failed totally to offer any reason in justification for the distinction but, rather, has woodenly repeated, again and again that the ordinance should be upheld because it is a zoning ordinance. The Borough has failed totally to explain the need for a rule which would allow coin-operated amusement booths in which patrons might individually view films but not coin-operated amusement booths in which patrons may individually view a live nude dancer performing beyond a glass panel. Since the Borough has imposed by its rule this arbitrary distinction unrelated to any demonstrated substantial relation to the public health, safety, morals, or general welfare and since its rule cuts so deeply into the fundamental right of free expression, the Borough's ordinances, as interpreted and applied, must fall under the limited standard of review of zoning decisions preserved and *Euclid* and *Nectow. See Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 at 520-521, concurring opinion of Stevens, J.

## CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the appellants submit that the Zoning Ordinances of the Borough of Mount Ephraim as interpreted by the Borough and the Camden County Court and as applied to them are constitutionally invalid as suppressive of their First Amendment freedoms of speech and expression and as offensive to their Fourteenth Amendment guarantees of due process and equal protection. Accordingly, the appellants request that this Court declare the Borough's zoning ordinances as interpreted by the Borough and the Camden County Court as applied to them to be invalid and they further request that their convictions be reversed.

Respectfully submitted,

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